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No. 96-1545

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ROBERT LANE,
Petitioner,
v.
MINISTRY OF DEFENSE, STATE OF ISRAEL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held on the particular facts of this case that petitioner's claims against Israel must be dismissed under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*

LIST OF PARTIES AND RULE 29.6 LIST

The parties to this case are petitioner Robert Lane and respondents Ministry of Defense, State of Israel and National Airmotive Corporation, a California corporation.

National Airmotive Corporation is a wholly owned subsidiary of First Aviation Services, Inc., which in turn is wholly owned by First Equity Development, Inc.

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BRIEF IN OPPOSITION

Respondent Ministry of Defense, State of Israel ("Israel") hereby opposes the petition for a writ of certiorari filed by petitioner Robert Lane.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this matter are the "commercial activity" and the "noncommercial tort" exceptions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1605(a)(2), (5).

STATEMENT OF THE CASE

Petitioner's employer, National Airmotive Corporation ("NAC"), terminated his employment because it concluded petitioner had personally engaged in serious misconduct during his employment. By this suit, petitioner seeks to hold Israel responsible for his termination. He does so even though Israel took no part in NAC's decision and, as his complaint acknowledges, Israel is a

"sovereign foreign state", ER 3 ¶ 2,[1] presumptively immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* ("FSIA"). The court of appeals held that there is no jurisdiction over Israel in this case and no reason exists to disturb that holding.

1. Between 1985 and 1990, NAC and Israel entered into a series of contracts under which NAC agreed to provide Israel services, technical assistance, spare parts and materials required to repair and remanufacture engines for use by Israel's Air Force. ER 4,5 ¶¶ 7-9; Req. Not. As Manager of Special Programs, Director of Customer Support, and later Director of Special Programs for NAC, petitioner performed a variety of technical and administrative services related to these contracts. ER 4,5 ¶¶ 7-9.

Israel's purchase of these defense goods and services from NAC was funded by the United States government through the Department of Defense's Foreign Military Financing ("FMF") Program. ER 39. This program, authorized by the Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751-2799, allows the use of funds appropriated by Congress to finance the "procurement of defense articles, defense services, and design and construction services by friendly foreign countries and international organizations." 22 U.S.C. § 2763(a).

2. The United States Department of Justice conducted an investigation of criminal activity committed by NAC in connection with its contracts with Israel—including conspiring to defraud the United States and submitting claims which falsely represented that United States funds were being used for approved FMF program purposes when in fact they were not. ER 5-6 ¶ 10; ER 39-47.

As a result of these investigations, NAC entered into a plea agreement with the Department of Justice in July

[1] "ER" refers to the Appellant's Excerpt of Records on appeal to the Ninth Circuit. "Req. Not." refers to Appellant's Request for Judicial Notice on appeal.

1993, under which NAC agreed to pay a total of $3,000,000 in civil and criminal penalties to the United States. ER 39. NAC also entered into an Administrative Settlement Agreement with the Department of Defense under which it agreed to terminate or not re-employ those employees whose actions were responsible for NAC's violations of law. ER 42-44.[2]

NAC also conducted its own internal investigation to identify individuals responsible for the misconduct found by the United States' investigation. As a result of this investigation, petitioner was placed on administrative leave in June 1993, ER 7 ¶ 13, and in August 1993 informed by letter that his employment was terminated. ER 7 ¶ 14. The letter stated that, "[t]he basis for termination include [sic] your involvement in various unlawful acts relating to the Government of Israel contract and your commission of other improper acts, such as your unauthorized removal of a sensitive document from the company's premises." *Id.*

3. On August 3, 1994, petitioner filed this action alleging wrongful termination by NAC under state law. ER 1. The central allegation of the complaint is that the "unlawful acts" NAC cited as the basis of petitioner's termination were committed not by him, but by NAC and Israel. ER 8, 10, 12 ¶¶ 15, 21, 25. Petitioner alleges that by improperly holding him responsible for Israel's conduct, NAC breached its employment contract with him and, in some unexplained fashion, NAC's procurement contracts with Israel. ER 11-13 ¶¶ 23-25.

Although petitioner does not allege that Israel played any role whatsoever in NAC's decision to terminate his employment, he names Israel as a defendant in the first three of his 13 causes of action. Petitioner's first claim

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[2] Petitioner has misleadingly included in the appendix to his Petition what purports to be the jury's verdict against former Israel employee Yechiel Bart. Pet. App. A-31. Mr. Bart was neither indicted nor convicted for his activities relating to Israel's contracts with NAC.

alleges that an "actual controversy" exists between him, NAC and Israel as to whether NAC's termination of his employment was "legal and proper." Petitioner alleges that NAC's termination of its contract with him was "wrongful" because he never "committed any unlawful acts . . . relating to the Government of Israel Contract" and that any "unlawful acts . . . were committed solely by defendant ISRAEL and/or defendant NAC . . . ." ER 8 ¶ 15. He seeks, based on these allegations, a declaration of his "rights and duties," if any, under the contracts between NAC and Israel. *Id.*

Petitioner's second claim for "loss of property" is also based on Israel's alleged responsibility for the unlawful activity that NAC cited as the reason for terminating his employment. It alleges that Israel committed "tortious acts" by "attempting to conspire with NAC to set aside funds, in one or more special accounts . . . for use by Defendant ISRAEL for purposes that had not been approved or authorized for funding by the United States . . . ." ER 10 ¶ 21. Without explaining how, petitioner alleges this conduct "caused Plaintiff to lose his property, to wit, his job with Defendant NAC." ER 11 ¶ 21. Petitioner makes no attempt to specify what tort Israel committed or how it caused his injury.

Finally, although the procurement contracts between Israel and NAC expressly state that there are no third party beneficiaries,[3] petitioner also asserts a claim for breach of those contracts on an intended third-party beneficiary theory. ER 10-12 ¶¶ 24-25. He asserts that Israel breached those contracts by (1) failing to obtain approvals required under the AECA for specified commercial contracts, ER 12 ¶ 24, and (2) diverting funds paid by the United States under the FMF program to "special

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[3] Req. Not., Contract T-56-A-15, Article 15; Contract 250-C20, Article 15 (providing that Israel may terminate the contract "at its convenience and discretion"). *See also* Req. Not., Contract T-56-A-15, Article 25.7; Contract 250-C20, Article 25.7 ("no party is intended to or shall have any right or interest under this Contract, except as provided above").

accounts" to be used for purposes not authorized by the AECA. ER 10-11 ¶ 25. Petitioner also alleges, again without explaining how, that these breaches caused him to be terminated by NAC. ER 12-13 ¶ 25.

Significantly, petitioner does not allege that Israel failed either to accept or to pay for all the goods and services covered by the Israel-NAC contracts or that Israel breached any specific provision of those contracts. Nor does he attempt to plead what terms of the Israel-NAC contracts show any intent by either Israel or NAC to benefit him either individually or as a member of a class.

In sum, this is simply a wrongful termination action in which an employee claims his employer wrongly blamed him for a third party's misconduct and therefore had no proper cause to terminate him. Rather than simply challenge the validity of his employer's discharge, petitioner also seeks to attach liability to the third party, even though he makes no allegation that the third party participated in or affected the termination decision in any respect.

Petitioner's complaint attempts to avoid the immunity provided to sovereign foreign states against such claims by asserting that all three of his claims against Israel fall within the "commercial activity" exception to the FSIA, 28 U.S.C. § 1605(a)(2),[4] and that his so-called "loss of property" claim falls within the "noncommercial tort"

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[4] Section 1605(a)(2) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . .

28 U.S.C. § 1605(a)(2).

exception to the Act, 28 U.S.C. § 1605(a)(5).[5] ER 4, 10 ¶¶ 6, 20; ER 99-103.

4. Israel moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction on the ground that none of petitioner's claims against Israel falls within either the "commercial activity" or the "noncommercial tort" exception of the Foreign Sovereign Immunities Act. ER 59-89. Israel requested, in the alternative, dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

The district court denied Israel's motions, finding that the "commercial activity" exception provided subject matter jurisdiction over plaintiff's second cause of action:

> So on its most superficial level it seems to me that [the complaint] does allege that there were contracts, contracts between NAC and the State of Israel. And Paragraph 21 alleges that in connection with those contracts, certain tort or torts occurred.
>
> Now, just that superficially indicates . . . that this cause of action, at least this cause of action, arises out of commercial activity.

ER 169. Based on this analysis, the court further concluded that it had supplemental jurisdiction over the other two claims against Israel. *Id.*

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[5] Section 1605(a)(5) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state . . . .; except this paragraph shall not apply to—
>
> . . . .
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . .

28 U.S.C. § 1605(a)(5).

The district court initially stated that it was making "no ruling" on Israel's 12(b)(6) motion "until we get to the summary judgment point," ER 173, but then indicated that "there is enough allegation in [the second cause of action] of a tort or a breach of contract to hold you in. That's what I am deciding." ER 177.

5. A unanimous panel of the court of appeals reversed the ruling on the 12(b)(1) motion, holding that none of petitioner's claims falls within any exception to sovereign immunity enumerated by the FSIA. Pet. App. A-8 to A-12.

The court of appeals recognized that the applicability of the "commercial activity" exception to petitioner's claims is governed by this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Pet. App. A-9. In *Nelson*, the Court held that a claim must have "more than a mere connection with, or relation to, commercial activity," to fall within the exception. 507 U.S. at 358. Rather, the particular allegations of a complaint must be "based upon" specific commercial activity by the foreign sovereign defendant. *Id.*

The court of appeals held that none of petitioner's claims satisfied the *Nelson* test. Although the court recognized that "military supply contracts are considered commercial," Pet. App. A-8, it concluded that, "[j]ust as in *Saudi Arabia v. Nelson*, the injuries alleged in [petitioner's] complaint are not more than 'merely related' to the commercial activity of the foreign sovereign." Pet. App. A-10. As it explained,

> [Petitioner]'s grievance arises from his termination by NAC and out of his employment relationship with NAC. His claims are based not upon Israel's commercial conduct in the United States but upon actions taken by NAC.

Id.

The court then ruled that petitioner's tort claim does not fall within an enumerated exception to immunity for two reasons. First, his tort claim does not satisfy the "commercial activity" exception (under which it was "properly analyzed") for the reasons it had already explained. Pet. App. A-11. Second, "even if . . . characterized as a noncommercial tort," that claim did not satisfy the noncommercial tort exception of Section 1605 (a)(5)(B) because it "is essentially a claim arising out of interference with contract rights," a claim which is expressly excluded by Section 1605(a)(5)(B) from the definition of non-immunized torts. *Id.*

REASONS FOR DENYING THE PETITION

Petitioner makes three arguments in support of his request for review of the court of appeals' unpublished opinion in this case. First, he argues that the court of appeals' decision "incorrectly applies this Court's decision" in *Nelson*. Pet. at 5. Second, he argues that the court below erroneously held, assertedly in conflict with decisions in other circuits, that the "commercial activity" exception is inapplicable here as a matter of law because there was no commercial relationship between petitioner and Israel. *Id.* at 9. Finally, he argues that the court of appeals erroneously held, again assertedly in conflict with other circuits, that a claim for interference with contract can never satisfy the "commercial activity" exception. *Id.* at 13-14.

Contrary to petitioner's contention, the court of appeals' decision is completely faithful to this Court's decision in *Nelson*. Moreover, the decision below is plainly correct, and does not create a conflict among the circuits. To the contrary, the court of appeals correctly applied the rule enunciated in *Nelson* to the specific allegations pled in petitioner's complaint. Indeed, the court of appeals never decided, nor did it need to decide, the points of law which petitioner wrongly characterizes as inter-circuit conflicts. This case thus does not present any important or novel legal question, only the straightforward application of the *Nelson* test to petitioner's specific factual allegations.

I. PETITIONER'S ASSERTION THAT THE COURT OF APPEALS MISAPPLIED THE RULE OF *NELSON* TO THE PARTICULAR FACTS OF THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioner's primary argument is that the court of appeals failed properly to apply this Court's holding in *Nelson*. In that case, this Court held that the phrase "claim based upon a commercial activity" in § 1605(a)(2) requires a careful identification of the "particular conduct on which the . . . action is 'based' for purposes of the Act." 507 U.S. at 356. In addition, the Court reasoned that the language requires "more than a mere connection with, or relation to, commercial activity." *Id.* at 358. As applied in that case, the Court concluded that the hiring of the plaintiffs by Saudi Arabia could be characterized as commercial, but the act of torture by the State, which was the real basis for their claim, was not "based on" that commercial activity.

The Court expressly rejected a "but for" causation theory as insufficient to satisfy the FSIA's "based upon commercial activity" requirement, concluding that, while Saudi Arabia's hiring activities "led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit." *Id.* at 358. Moreover, the Court rejected as a "semantic ploy" plaintiffs' argument that the injuries arose from a failure to warn them during the hiring process. *Id.* at 363.

Nelson controls this case and requires dismissal for want of jurisdiction. A "careful identification" of the conduct giving rise to petitioner's claim here plainly reveals, as the court of appeals correctly observed, that "[petitioner]'s grievance arises from his termination by NAC . . . [and is] not [based] upon Israel's commercial conduct in the United States . . . ." Pet. App. A-10.[6]

[6] If anything, petitioner's claim is weaker than the Nelsons'. In *Nelson*, Saudi Arabia engaged in commercial activity directly with the plaintiffs and engaged in activities that injured them. Nevertheless, the Court held that the relationship between the hiring and

Nor can petitioner avoid this conclusion by artful pleading. He asserts that his complaint is tied "directly" to Israel's performance of its contracts. Pet. at 8. But inserting the word "directly" is still a "semantic ploy" that cannot conceal the essential nature of this claim for wrongful termination by NAC.

Finally, petitioner's arguments concerning *Nelson* are inherently unworthy of review by this Court. He does not contend, nor could he, that the court of appeals purported to do anything other than apply this Court's holding in *Nelson* to the peculiar facts of his case. Under these circumstances, this case is hopelessly factbound and therefore does not warrant further review by this Court.[7]

II. THE COURT OF APPEALS DID NOT, AS PETITIONER CONTENDS, CONSTRUE THE "COMMERCIAL ACTIVITY" EXCEPTION TO REQUIRE A DIRECT COMMERCIAL RELATIONSHIP BETWEEN PETITIONER AND ISRAEL.

Petitioner next argues that the Ninth Circuit erroneously held that the "commercial activity" exception is inapplica-

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the injury was too attenuated. Here, the commercial activity is between Israel and a third party. Petitioner has no claim against Israel absent his termination from NAC. To leapfrog NAC's conduct and attach liability to Israel would be to resurrect the "mere connection with, or relation to, commercial activity" test this Court expressly rejected in *Nelson*. 507 U.S. at 358.

[7] *Walter-Fuller Aircraft Sales v. Republic of the Philippines*, 965 F.2d 1375 (5th Cir. 1992) and *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), on which petitioner relies, are not to the contrary. In both of those cases, unlike here, the plaintiff demonstrated not only that the defendant engaged in commercial activity, but also that the commercial activity was the specific conduct on which the suit was based. *Walter-Fuller*, 965 F.2d at 1384-86 (commercial activity exception applicable to suit by an American who purchased an aircraft from the Philippines for breach of contractual obligation to defend the purchaser against any subsequent claims by third parties of title to the aircraft); *Joseph*, 830 F.2d at 1024 (commercial activity applicable to landlord's claim against tenant Nigeria for conversion, trespass, breach of contract and waste).

ble here as a matter of law because there was no commercial relationship between himself and Israel. Pet. at 9. According to petitioner, this "holding" conflicts with the Seventh Circuit's decision in *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574 (7th Cir. 1989), which held that the "commercial activity" exception may apply even in the absence of a contractual relationship between the plaintiff and the defendant. Petitioner's argument rests on a fundamental misreading of the court of appeals' opinion in this case, which does not in any way conflict with *Rush*.

The court of appeals' opinion does not suggest that the "commercial activity" exception is inapplicable here simply because petitioner did not have a direct contractual relationship with Israel. To be sure, the court of appeals correctly mentioned in passing that petitioner had no such relationship with Israel. Pet. App. A-10. Nevertheless, the opinion makes clear that this observation is not the basis of the court of appeals' holding. Rather, as explained above, the court held that "the injuries alleged in the complaint are not more than 'merely related' to the commercial activity of the foreign sovereign." *Id.*[8] Thus, the court of appeals' opinion here does not in any way conflict with the Seventh Circuit's decision in *Rush*.

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[8] By contrast, in *Rush* the contract was for the provision of heart transplant operations, which the plaintiff hospitals supplied and for which the Government of Greece refused to pay. Thus, its holding that the hospitals' claims for reimbursement were based on Greece's commercial activities seems plainly correct and is just as plainly not at all helpful to petitioner here.

III. THE COURT OF APPEALS, CONTRARY TO PETITIONER'S ASSERTION, APPLIED THE "COMMERCIAL ACTIVITY" EXCEPTION WITHOUT CONSIDERING WHETHER ANY OF PETITIONER'S CLAIMS FELL WITHIN THE SEPARATE "NONCOMMERCIAL TORT" EXCEPTION.

Finally, petitioner argues that the court of appeals erred in holding that the "commercial activity" exception can never be satisfied by a claim for interference with contract because that tort is expressly excluded from the "noncommercial tort" exception. Pet. at 13-14. Petitioner asserts that this holding conflicts with the Fifth and Sixth Circuits' holdings in *Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F.2d 445 (6th Cir. 1988), and *Walter-Fuller,* 965 F.2d 1375, that claims for interference with contract, even if excluded from the "noncommercial tort" exception, may nevertheless fall within the "commercial activity" exception. Petitioner's argument again rests on a manifest misreading of the court of appeals' opinion.

After concluding that *none* of petitioner's claims falls within the "commercial activity" exception, Pet. App. A-10, the court of appeals went on *independently* to analyze whether petitioner's second cause of action for "loss of property" fell within the "noncommercial tort" exception. In considering this issue, the court of appeals first concluded that this claim, which Israel demonstrated and petitioner conceded before the court of appeals is not a cognizable tort claim, should not be analyzed under the "noncommercial tort" exception at all, but rather "is properly analyzed under the commercial activity exception." Pet. App. A-11.

The court of appeals went on to conclude that,

> *even if* [*petitioner*]*'s action is characterized as a noncommercial tort claim,* Israel retains immunity under Section 1605(a)(5)(B). [Petitioner]'s loss of property claim . . . is essentially a claim arising out of interference with contract rights. The exception to

> the noncommercial tort exception therefore preserves immunity for Israel.

Id. (emphasis added). Petitioner never mentions, let alone criticizes, this correct holding, which compelled the dismissal of his "loss of property" claim under the "noncommercial tort" exception. Certainly, this alternative holding raises no issue warranting review by this Court.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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